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Nos. 06-713 & 06-730

IN THE

Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

-and-

WASHINGTON, *et al.*,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT LIBERTARIAN PARTY OF WASHINGTON

RICHARD SHEPARD
SHEPARD LAW OFFICE, P.L.L.C.
Attorneys for Respondent
Libertarian Party of Washington
818 South Yakima Avenue
Suite 200
Tacoma, Washington 98405
(253) 383-2235

210227

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Is Washington State's partisan "top two" primary election system constitutional merely because the state asserts voters are not "choosing" a party's "nominee," even though I-872 determines which Libertarian candidates appear on the general election ballot, abandons this Court's ballot access jurisprudence by unreasonably restricting access to the general election ballot, unlawfully converts the trademarked Libertarian Party name to the state's own use, deprives the Libertarian Party of its First Amendment associational right to define the scope of its association, severely burdens the Libertarian Party's ability to financially support its duly nominated candidates, and serves no legitimate state interest?

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STATEMENT OF THE CASE

Washington State has always had a partisan election system.[1] In 2000 this Court declared that representative democracy is "*unimaginable*" without the involvement of political parties.[2] In 2003, after three legal challenges over several decades,[3] Washington's blanket primary system was held unconstitutional because it "prevents a party from picking its nominees."[4]

In response, Washington voters adopted Initiative 872 (hereinafter "I-872"), in which the sponsors attempted to "evade important constitutional restraints"[5] to return Washington to a blanket primary system. The Petitioner Washington State Grange (hereinafter the "Grange") suggests that it drafted I-872 to satisfy the description of a "*nonpartisan blanket primary*" discussed by this Court in *Jones*.[6] To the contrary, and according to the initiative itself, I-872 was expressly intended to become effective only if the

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1. A detailed history of primary election law in Washington State is set forth in Part V of *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), *see* Appendix to Washington's Petition for Certiorari, at 35a. (hereinafter Wash. App.).

2. *California Democratic Party v Jones*, 530 U.S. 567, 574 (2000) (hereinafter "*Jones*").

3. *Anderson v. Milliken*, 59 P.2d 295 (WA 1936), *Heavey v. Chapman*, 611 P.2d 1256 (WA 1980), *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. den.*, 540 U.S. 957, and *cert. den.*, 541 U.S. 957 (2004).

4. *Reed*, 343 F.3d at 1204.

5. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-834 (1995), and compare *Cook v. Gralike*, 531 U.S. 510, 522-523 (2001).

6. *Jones*, 530 U.S. at 585.

court decision invalidating the traditional blanket primary[7] became final.[8] According to campaign literature published by the Grange, the objective of I-872 was to "restore the kind of choice that the voters enjoyed for seventy years with the blanket primary"[9] and to "look nearly identical to the blanket primary system"[10] that had been invalidated.

In fact, I-872 omitted a crucial element of the "*nonpartisan blanket primary*" description, i.e., "nomination by established parties or voter-petition requirements for independent candidates."[11] Far from eliminating the previous state regulation of the party nominating process, as argued by Petitioner State of Washington (hereinafter "Washington")[12], I-872 delivers a fatal blow to the Respondent Libertarian Party of Washington State (hereinafter "Libertarian Party").

I-872 did not return political parties to the status quo ante to adoption of the Australian ballot. The government still prints all ballots and determines what names are to appear on them. Inconsistent with the model "*nonpartisan blanket primary*" discussed in *Jones*[13] and established ballot access

7. *Reed, supra.*

8. Initiative 872 § 18, JA - 420.

9. Voter's Pamphlet Statement For Initiative 872, JA – 407, and, *compare*, Initiative 872, § 3, JA - 411, with Wash. Rev. Code § 29.18.200 (2003).

10. "Yes On 872" website home page. *See* http://www.blanket primary.org/ (Last visited 7/30/07).

11. *Jones*, 530 U.S. at 585.

12. Washington's opening brief on the merits, at 16 (hereinafter "Wash. Br.").

13. *Jones*, 530 U.S. at 585.

law, I-872 ignores the results of any political party nominations. Instead, it allows any candidate to assert a "preference" for any political party, regardless whether the party approves of the candidate or even whether the candidate is a party member.[14]

In addition, I-872 converts the trademarked Libertarian Party name to Washington's own use, offering the Libertarian name to any candidate, without any opportunity for the Libertarian Party to participate or object.[15] Every person wishing to be a candidate for partisan office has the opportunity, at the candidate's exclusive option, to disperse and/or dilute voter support for duly nominated candidates of the Libertarian Party. Any citizen wishing to vote for (or oppose) Libertarian Party nominees has no assurance, without resorting to collateral information not provided by the government, how the election related messages of the candidates "preferring" the Libertarian Party are in any way related to the Libertarian Party or its message.

Finally, I-872's "top two" primary scheme eliminates all meaningful opportunities for a Libertarian Party candidate, or any other third party or independent candidate, to reach the general election ballot. The disadvantages of third party and independent candidates in certain election systems are well known.[16] Professor Duverger has shown that voters in single-member district systems who are fearful of casting a "wasted vote" tend to vote for parties and/or candidates having a realistic chance of winning, even if another party

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14. Initiative 872 § 7, JA 413-414.

15. *Id.*

16. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 357 (2004) (Breyer, J. dissenting).

or candidate more closely represents the voter's political views, thus perpetuating the dominance of two strong political parties.[17]

I-872 replaced the so-called "modicum of support" test with a "top two" test for access to the general election ballot,[18] effectively institutionalizing a two-party system that assures Libertarian Party candidates will never make it to the general election ballot except in the most unusual of circumstances. The sponsors of I-872 admitted in their campaign literature that Libertarian Party candidates were "more likely" under I-872 to avoid federal and statewide offices, and that their only chance to access the general election ballot was in smaller districts dominated by one major party.[19]

Professor Schattschneider taught, "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[20] Since I-872 uses an Australian ballot in which only two candidates advance to the general election in a single member district the way remains "opened toward regulation of the entire nominating process."[21] Washington still "makes" the

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17. Duverger, Maurice, "Factors in a Two-Party and Multiparty System," in *Party Politics and Pressure Groups*, (New York: Thomas Y. Crowell, 1972), pp. 23-32.

18. When Libertarian Party candidates participated in the now invalid blanket primary they needed only to obtain 1% of the total vote to move to the general election ballot. *See Munro v Socialist Worker's Party*, 479 U.S. 189 (1986).

19. JA – 80.

20. E.E. Schattschneider, *Party Government* 64 (1942).

21. Wash. Br. at 6 (citing to Merriam & Overacker, *Primary Elections*, 24 (1928)).

nomination procedure and I-872 "owns" the future of the Libertarian Party. I-872 will unquestionably "dictate electoral outcomes, [and] . . . favor or disfavor a class of candidates."[22]

In sum, I-872 not only allows renegade and imposter candidates to dilute or corrupt the Libertarian Party's message as well as to disperse voter support for the duly nominated Libertarian Party candidate in the primary election; it also forces the Libertarian Party to radically alter its primary election behavior. Indeed, it forces supporters of the Libertarian Party in strong two-party districts to search for reasons to remain organized.

On May 19, 2005 the Libertarian Party and some of its adherents sought leave to intervene in a suit brought by the Washington State Republican Party. The Libertarian Party claimed that I-872 places impermissible limits on access to the general election ballot contrary to the U. S. Constitution, and allows a person to appropriate the Libertarian Party label without compliance with its nominating rules and without allowing the Party to define what the Party label means.[23] The district court and the Ninth Circuit both determined that political parties' rights of association were severely burdened and declared I-872 unconstitutional in its entirety.[24] Neither the district court nor the Ninth Circuit reached the other issues raised by the Libertarian Party.[25]

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22. *Thornton*, 514 U.S. at 833-834.

23. JA 44-60.

24. *Washington State Republican Party v Washington*, 460 F.3d 1108 (2006), *see* Wash. App. at 1a; and *Logan*, *supra*, *see* Wash. App. at 35a.

25. Wash. App. 33a, 84a.

Apparently blind to I-872's lethal attack upon the Libertarian Party, Washington and the Grange appeal to this court to reverse the Ninth Circuit. Washington argues generally that I-872 is authorized by the "*nonpartisan blanket primary*" dictum in *Jones*, and that the burdens suffered by the political parties are not severe enough to warrant this Court's strict scrutiny. The Grange argues basically that the voter and candidate rights involved outweigh political party rights. Both are wrong.

For the following reasons, this Court should affirm the Ninth Circuit.

SUMMARY OF ARGUMENT

Washington State's partisan "top two" primary election system imposes overly restrictive requirements for access to the general election ballot. It is not the primary at which candidates are elected to public office; but rather, the general election. Yet I-872 allows access to the general election ballot through one route only, replacing the traditional "modicum of support" ballot access test adopted by this Court with an outcome directed popularity contest that will insulate the two major parties from any competition from third party or independent candidates on the general election ballot. The candidate "winnowing" system favors candidates who appeal to the political center of the electorate while it suppresses the speaker's autonomy rights of third party and independent candidates. [26]

The system imposes an additional burden on the Libertarian party because the Libertarian Party name is a

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26. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

federally registered trademark. Through I-872 Washington unlawfully converts the Libertarian Party name to the state's own use, for the state's own purpose, without the permission or participation of the Libertarian Party. Even though it allows candidates to use party names on the ballot, it deprives candidates of the opportunity appear on the ballot as party nominees and deprives voters of the opportunity to vote for a party's nominee regardless of the name of the candidate. Finally, I-872 effectively prevents the Libertarian Party from being classified as a "major party" or even as a "*bona fide* political party" under Washington's campaign finance laws. In consequence the Libertarian Party is subject to far more stringent campaign contribution limits than which apply to Washington's major parties.

Petitioners have shown no legitimate state interest that supports this new system. Contrary to the arguments of petitioners, the rights of voters and candidates are not enhanced by I-872. Rather than assisting the people in directing their own self-government, I-872 deprives voters of the ability to rely on political parties or political party names, particularly in the long term—even though political science generally recognizes a political party is one of the few coordinating forces within the Madisonian system of checks and balances that make *any* government action possible.[27]

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27. *See, e.g.*, Schattschneider, E.E., *Party Government*, 1 (1942); Rossiter, C., *Parties and Politics in America* (1960); Aldrich, John *Why Parties?* 18 (1995).

ARGUMENT

I-872 VIOLATES THE LIBERTARIAN PARTY'S RIGHTS

Political parties play an essential role "in brokering group interests and solving voter's collective action problems. A polity without parties places a greater cognitive burden on individual voters and weakens the collective responsibility of political parties."[28] The cases decided by this Court "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[29]

> Representative democracy in any populous unit of governance is *unimaginable* without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.[30] (emphasis added)

I-872 creates the unimaginable.

I-872 DEPRIVES THE LIBERTARIAN PARTY OF REASONABLE BALLOT ACCESS

> For more than two decades, this Court has recognized the constitutional right of citizens to

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28. Persily and Cain, *Symposium: Law and Political Parties: The Legal Status of Political Parties: a Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 787 (2000).

29. *Jones*, 530 U.S. at 575.

30. *Jones*, 530 U.S. at 574.

> create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.[31]

This Court's recognition of political freedom and the right to politically associate reaches back to the formation of the United States.

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties.[32]

This Court has held that no ballot access regime may "operate to freeze the political status quo . . . [and all must recognize] . . . the potential fluidity of American political life."[33]

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31. *Norman v Reed*, 502 U.S. 279, 288 (U.S., 1992) (citing to *Anderson v. Celebrezze*, 460 U.S. 780, 793-794 (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); and *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

32. *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957).

33. *Jenness v. Fortson*, 403 U.S. 431, 438-439 (U.S. 1971).

Nonetheless, in one sweeping move I-872 abandons all of the general election ballot access jurisprudence developed by this Court; replacing it with a "winnowing" process that institutionalizes the two major parties.

Washington Cannot Require More Than A "Modicum Of Support" For Access To A Partisan General Election Ballot

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.[34]

No other state but Washington requires voter support of more than 2.05% of the electorate for a U.S. Senate and Governor candidate to access the general election ballot.[35] Data obtained from the Secretary of State regarding the *top four* candidates in primary elections for partisan statewide offices in Washington from 1998 to 2004 reveals a candidate is likely required to obtain 21% *or more* of the total vote in order to move to the general election ballot in a top-two system. Third place candidates, often Democratic or Republican Party candidates and not third party candidates, generally range between 4% and 21% of the total vote.[36] Ballot access expert Richard Winger showed by declaration dated July 5, 2005 that the average percentage of the total vote received by each second place candidate in any primary election for a federal

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34. *Rhodes*, 393 U.S. at 31 (1968).

35. JA – 353-356.

36. JA – 309-312.

or state office in Washington from 1992 to 2002 (during which the old blanket primary was still operative) was 32.43%.[37]

Mr. Winger also found over the same period *no minor party candidate ever finished first in any primary*, and except for the obvious cases in which only one major party candidate was running in that district, a *minor party candidate finished second only once*. In that contest a Reform Party candidate finished second behind a Democrat (who polled nearly 64% in the primary) and ahead of another Democrat and a Libertarian. No Republican candidate had entered the contest.[38]

Nothing in this Court's ballot access jurisprudence suggests that a state can require more than a "modicum of support" from voters for access to a partisan general election ballot, or that the quantity of support required for partisan general election ballot access may be determined by the results of a primary election.[39] *Storer v Brown* held that 5% of the electorate is as high a threshold as the U.S. Constitution will allow.[40] Any requirement in excess of 5% is likely to fail a constitutional challenge under the Elections Clause[41]

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37. JA – 751-761

38. *Id*. These results are consistent with Professor Duverger's prediction. *See* note 17, *supra*.

39. The fact that I-872 requires votes rather than signatures to demonstrate support is irrelevant. This Court was previously "unpersuaded, . . . , that the differences between the two mechanisms are of constitutional dimension." *Munro*, 479 U.S. at 197

40. *Storer v. Brown*, 415 U.S. 724, 739 (1974)

41. *Id*. And *see* further discussion at "Washington's Partisan "Top Two" Primary Violates the Elections Clause of the Constitution," *infra*.

or the Equal Protection Clause.[42] Nonetheless, I-872 implements a system requiring voter support well in excess of this constitutional maximum; the actual number and/or percentage of votes required for access to general election ballot in each contest being incapable of determination until after the primary takes place!

Washington Must Provide More Than One Route To A Partisan General Election Ballot

I-872 provides only one route to the *partisan* general election ballot, by winning or placing second in the primary.[43] None of the ballot access cases decided by this Court suggest that a state may provide only one route to a partisan general election ballot under any circumstance. To the contrary:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v Rhodes*."[44]

This observation applies equally to independent or unaffiliated candidates.

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a

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42. *Jenness*, supra, and *Rhodes*, *supra*.

43. Initiative-872, § 7(2), Wash. Br. 2.

44. *Jenness*, 403 U.S. at 442 (citing to *Rhodes*, 393 U.S. 23 (1968)).

> new political party. . . . But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." (citation omitted)[45]

The number and reasonableness of alternative routes to the general election ballot has been a major factor in the result of several ballot access cases.[46] *Burdick v. Takushi*[47] upheld Hawaii's elimination of write-in candidacies because Hawaii had three alternative and relatively easy routes to the ballot.[48]

By limiting the number of routes to the general election ballot to one only, and by limiting the number of partisan candidates who may appear on the general election ballot to two who by definition must show far more than a "modicum of support" to appear on the general election ballot, I-872 undermines the very same constitutionally protected rights that *Williams v. Rhodes*, *Jenness v. Fortson*, and their progeny have recognized and protected. Rather, it guarantees that only candidates who perform well in a de facto two party system will populate general election ballots.[49]

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45. *Storer*, 415 U.S. at 745 (U.S., 1974) (cited with approval in *McCarthy v. Briscoe*, 429 U.S. 1317, 1320 (U.S. 1976)).

46. *See, e.g., Jenness*, supra, *Storer*, supra, *Am. Party of Tex. v White*, 416 U.S. 767 (1974), and *Briscoe*, supra.

47. 504 U.S. 428 (1992).

48. Initiative-872 does not address the "write-in candidate" statute, Wash. Rev. Code § 29A.24.311. However, Washington's position that I-872 "impliedly repealed" the minor party nominating statutes probably means the write-in statute was also repealed.

49. *See* note 17, *supra*, and accompanying text.

I-872 UNLAWFULLY CONVERTS THE LIBERTARIAN PARTY NAME TO THE STATES' OWN USE

The name "Libertarian Party" is a registered trademark of the Libertarian National Committee that has been in use since 1972.[50] The Libertarian Party has had a presidential candidate on the Washington State ballot every four years since then, in addition to several other statewide and local contests, thus making it an established name identifying a specific organization. I-872 unlawfully authorizes Washington, and candidates authorized by Washington, to assume and exercise rights of ownership over personal property, in this case a trademarked organizational name, belonging to the Libertarian Party.

Washington argues the Libertarian Party is not entitled to trademark protection because a statement of "party preference" on an election ballot it is not a use "in commerce."[51] First, I-872 requires a candidate's "party preference" to appear not only on the ballot, but also in Washington's published voter's pamphlet.[52] Further, there is nothing within I-872 to prevent any candidate, who has thus been encouraged by Washington to declare a "party preference" for Washington's own purpose, from declaring and using that "party preference" in soliciting donations, preparing press releases, holding public meetings and press conferences, and otherwise engaging in the activities of a typical political campaign.

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50. JA – 346-351.

51. Wash. Br. at 47 (citing, *inter alia*, to 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)).

52. Initiative-872 § 11, JA - 417.

The right to enjoin infringement of a trade or service mark "is as available to public service organizations as to merchants and manufacturers."[53] Retention of a distinct identity by a non-profit organization that sells no goods is just as important as it is to a commercial organization.[54] The Lanham Act has been applied to a wide variety of non-commercial public and civic situations,[55] and specifically to political organizations.[56] In *United We Stand Am., Inc.* the Second Circuit articulated sound policy reasons for including political organizations within the protection of the Lanham Act.

> A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has determined that the election of those

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53. *N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund*, 559 F. Supp. 1337, 1342 (D.D.C. 1983), *rev'd on other grounds*, 753 F.2d 131 (D.C. Cir.), *cert. denied*, 472 U.S. 1021(1985).

54. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 9:5 (4th ed. 1996).

55. *See, e.g., United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) and the cases cited therein.

56. *See Brach Van Houten Holding, Inc. v. Save Brach's Coalition For Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994) (soliciting donations, preparing press releases, holding public meetings and press conferences, and organizing on behalf of its members' interests was performing "services" within the meaning of the Lanham Act); and *Committee for Idaho's High Desert v. Yost*, 881 F. Supp. 1457, 1470-71 (D. Idaho 1995), *aff'd* , 92 F.3d 814 (9th Cir. 1996)(non-profit organization engaged in dissemination of information about environmental causes via news releases, newsletters, and public advocacy entitled to Lanham Act protection even if it did not "place products into the stream of commerce.")

> candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can support the endorsed candidates with some confidence that doing so will advance the voters' objectives. If different organizations were permitted to employ the same trade name in endorsing candidates, voters would be unable to derive any significance from an endorsement, as they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name. Any group trading in political ideas would be free to distribute publicity statements, endorsements, and position papers in the name of the "Republican Party," the "Democratic Party," or any other. The resulting confusion would be catastrophic; voters would have no way of understanding the significance of an endorsement or position taken by parties of recognized major names. The suggestion that the performance of such functions is not within the scope of "services in commerce" seem to us to be not only wrong but extraordinarily impractical for the functioning of our political system.[57]

Washington's own common law also prohibits deceptive non-commercial uses of organizational names.[58] An instructive

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57. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997) (citing to *Tomei v. Finley*, 512 F. Supp. 695, 698 (N.D. Ill. 1981) (preliminary injunction issued because of strong likelihood of confusion resulting from political party's use of acronym designed to deceive voters into thinking the candidate was of the opposing political party))(footnotes omitted).

58. E.g., *Prince Hall Lodge v. Univ. Lodge*, 62 Wn.2d 28, 35 (1963).

1924 Washington Supreme Court decision involved Progressive Party presidential candidate Robert LaFollette.[59] In that year citizens of Washington organized the "LaFollette State Party" and nominated several candidates for public office, including Mr. LaFollette for the federal office of President, all without Mr. LaFollette's authorization and against his wishes. Members of the Progressive Party of Washington, which had also nominated Mr. LaFollette for President, sought a writ of mandate preventing the Secretary of State from placing the candidates nominated by the "LaFollette State Party" on the general election ballot. In authorizing a writ directing the Secretary to strike the word "LaFollette" and to show on the ballot instead that the "State Party" had made the disputed nominations the court said:

> Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him.[60]

While *Hinkle* involved an individual's name, it clearly demonstrates the Washington Supreme Court places a significant value on the exclusive right of ownership to an established name beyond its use in commerce, including particularly within the realm of political speech.

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59. *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924).

60. *Hinkle*, 131 Wash., at 93.

The very idea that any government could convert political party names to its own use was, prior to I-872, *unimaginable*. Nonetheless, relying on *Norman v. Reed*,[61] Washington apparently theorizes that if a State may not regulate a candidate's use of a political party's name then neither may a political party regulate the use of its own name. The Grange argues similarly; that the Ninth Circuit decision turned the primary election ballot into a "speech free zone."[62] *Norman* itself belies this astounding logic. This Court said that the ills of misrepresentation and/or electoral confusion caused by multiple uses of a political party name within a defined geographical area may be prevented "by requiring the candidates to get formal permission to use the name from the established party they seek to represent, . . ."[63]

I-872 SEVERELY BURDENS LIBERTARIAN PARTY ASSOCIATIONAL RIGHTS[64]

A fundamental rule of the First Amendment is that a speaker has the autonomy to choose the content of his own message.[65] Judicial deference should normally be given to association assertions regarding nature of their own expression and what would impair that expression.[66] Political parties have the right

61. 502 U.S. 279 (1991).

62. Washington State Grange opening brief on the merits, at 22-28 (hereinafter Grange Br.).

63. *Norman*, 502 US at 290.

64. The Libertarian Party generally agrees with the associational rights arguments made by its co-Respondents, Washington State Republican Party and Washington Democratic State Central Committee, although it would perhaps emphasize different points of those arguments. Nonetheless, to avoid unnecessary duplication the Libertarian Party will focus instead on aspects of this case that uniquely affect the Libertarian Party.

65. *Hurley, supra.*

66. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

to "identify the people who constitute the association, and to limit the association to those people only."[67]

According to its own Constitution, the purpose of the Libertarian Party is, inter alia, nominate and run candidates for public office.[68] It requires as part of its internal rules that "[a]ll Libertarian candidates for partisan office shall be members of the Libertarian Party. . . ."[69] One becomes a member of the Libertarian Party by subscribing to or affirming a non-aggression pledge.[70] Upon proper procedures, the Libertarian Party may expel its members.[71]

This pledge of "no first use" of force is thus a doctrinal prerequisite to membership within the Libertarian Party, and hence a prerequisite to represent the Libertarian Party in public elections. This requirement has no known parallel within the Democratic Party, the Republican Party or any other nationally recognized party. Because I-872 imposes no duty upon candidates to comply with the Libertarian Party's "no first use" requirements of all its candidates it poses exactly the kind risk that could "severely transform" the Libertarian Party.[72]

As more fully briefed by the Democratic Party and Republican Party respondents, I-872 prevents the Libertarian Party from identifying and limiting its membership, including

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67. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

68. LPWA Const. Art. II, § 1; JA - 315.

69. LPWA Const. Art. XIII, § 1; JA - 325.

70. LPWA Const. Art. IV, § 1; JA - 316.

71. LPWA Const. Art. VI, § A(4); and Art. VIII, § B(2); JA – 319, 321.

72. *Jones*, 530 U.S. at 579.

particularly who may be a candidate of the party, by allowing any candidate to associate with the Libertarian Party merely by stating a "party preference" on the ballot. Even if this court were somehow to accept Washington's arguments and conclude the burdens placed upon the Democratic Party and the Republican Party by I-872 are something less than "severe", I-872 still severely burdens the Libertarian Party by destroying its ability to include in its message to voters the fact that ALL "Libertarian Party" candidates have affirmatively subscribed a "no first use" pledge.[73]

I-872 SEVERELY BURDENS THE LIBERTARIAN PARTY'S RIGHT TO FINANCIALLY SUPPORT IT'S NOMINEES

Washington law allows "major parties" and "*bona fide* political parties" to contribute more than 2.3 million dollars ($0.70 per state registered voter per cycle) to each of its candidates for statewide office.[74] A "major party" is one whose candidate receives 5% or more of the vote in a statewide general election.[75] In order for the Libertarian Party to become a "major party" under I-872 at least one statewide Libertarian Party candidate must earn perhaps 34% of a primary vote to even reach the general election.

If the district court correctly determined that I-872 "impliedly repealed" Washington's minor party nomination

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73. *Compare Ray v. Blair*, 343 U.S. 214 (1952) (parties may require candidate to execute pledge prior to certification as presidential elector).

74. Wash. Rev. Code § 42.17.640(4) As of July 27, 2007 Washington had 3,301,802 active registered voters. *See* http://www.secstate.wa.gov/elections/vrdb/pdf/Voter%20Registration%20Report%20(July%2027%202007).pdf (Last viewed July 28, 2007).

75. Wash. Rev. Code § 29A.04.086.

statutes,[76] I-872 also abolished the statute authorizing minor party "certificates of nomination".[77] A "certificate of nomination" is a statutory prerequisite to becoming a "*bona fide* political party" for campaign contribution purposes.[78] If the Libertarian Party is neither a "major party" nor a "*bona fide* political party", the most it can contribute to its statewide candidates is $1400.[79]

This is yet another example of how I-872 institutionalizes the two major parties, and impairs the First Amendment rights of Libertarians and other minor parties. Financing regulations are especially crucial in modern elections. The cost of a successful statewide campaign in Washington runs in the hundreds of thousands or millions of dollars.[80] A candidate's fundraising ability also has a direct effect on media coverage, which in turn influences voter preferences in both the primary and the general election.

Lubin v. Panish[81] invalidated on equal protection grounds filing fee statutes that required payment of a few hundred

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76. *Logan, supra*, Pet. App. 79a-84a.

77. Wash. Rev. Code § 29A.20.161.

78. Wash. Rev. Code § 42.17.020(6).

79. *Id.*

80. As of April 10, 2005, Washington's Secretary of State, Sam Reed, received and disbursed $651,319.93 in connection with his 2004 reelection campaign. *See* http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=788209&nQRSeq=4&nCurrentIndex=1&nPageNum=1&UseIrc=no As of June 29, 2005, Washington's Governor, Christine Gregoire, received and disbursed $6,364,683.93 in connection with her 2004 election campaign. *See* http://hera.pdc.wa.gov/wx/viewdoc_new.asp?strAppName=PDC&nZoomPercent=100&nDocId=808539&nQRSeq=6&nCurrentIndex=1&nPageNum=1&UseIrc=no (Last viewed July 26, 2007).

81. 415 U.S. 709 (1974).

dollars for ballot access, unless the state also had available a non-economic means of ensuring the "seriousness" of a candidate. Prior to I-872 Washington had allowed the Libertarian Party an opportunity to qualify as a "*bona fide* political party" and raise and spend funds at the same levels as the Democratic Party and Republican Party. If I-872 is upheld it is no longer possible for the Libertarian Party to become a "*bona fide* political party" and it can only become a "major party" if one of its candidates wins or places second in the primary.

The Equal Protection defect of I-872 in the campaign finance arena is that it deprives the Libertarian Party of that opportunity to raise funds in amounts comparable to those allowed to major parties. I-872 thus severely undermines the political viability of the Libertarian Party and its candidates, meanwhile insulating the major parties and their candidates from competition, regardless of the credentials or political views of the individual candidates.

I-872 IS NOT THE KIND OF "NONPARTISAN BLANKET PRIMARY" DISCUSSED IN JONES

Washington and the Grange argue strenuously that under I-872 "primary voters are not choosing a party's nominee," as if that fact proves I-872 is constitutional under this Court's holding in *Jones*.[82] They are wrong.

I-872 IS IN NO MEANINGFUL SENSE NON-PARTISAN

I-872 retains partisan labels for the use of all candidates regardless of the scope of their affiliation with the party. Washington attempts to downplay the significance of party

82. Wash Br. – 27.

labels on the ballot, calling them a "modicum of relevant information about the candidates"[83] However, I-872 remains fully partisan because it institutionalizes the two major parties in a "top two" primary that only major party candidates (or candidates stating a "party preference" for major parties) will win.[84] In addition, Washington campaign finance law makes partisan affiliation far more relevant to the Libertarian Party than mere candidate information.[85]

Moreover, Washington's co-petitioner Grange implicitly recognizes the substantive significance of a candidate's statement of "party preference" on the ballot, devoting two full sub-sections of its brief to advocating for the speech rights of candidates and railing against the Ninth Circuit for allegedly creating a "speech free zone" on the ballot.[86] In so arguing the Grange admits I-872 causes the very problem addressed by this Court in *Jones*, i.e., the ability to destroy a party by permitting candidates who do not share its core values to speak as if they were in support of or otherwise affiliated with that party.[87]

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83. Wash. Br – 24, 49.

84. *See* notes 17 and 35 – 38, *supra*, and accompanying text, and *see* "Washington's Partisan "Top Two" Primary Violates the Elections Clause of the Constitution," *infra*.

85. *See* "Initiative-872 Severely Burdens The Libertarian Party's Right To Financially Support It's Nominees," *supra*.

86. Grange Br. – 22-29, 39-43.

87. *Jones*, 530 U.S. at 581-582.

WASHINGTON'S PARTISAN "TOP TWO" PRIMARY VIOLATES THE ELECTIONS CLAUSE OF THE CONSTITUTION

The general power provided by the U.S. Constitution authorizing states to regulate the "time, place and manner"[88] of congressional elections does not authorize Washington to implement I-872. States may use primaries as limited qualifying mechanisms for candidates for the general election ballot,[89] but they must nonetheless confine their regulations within the boundaries of the U.S. Constitution.[90]

Even though states have a recognized interest in reducing crowded ballots and reducing voter confusion, this Court has allowed states only the right to use partisan primaries or conventions for major political parties[91] and a "modicum of support" test for all others[92] to limit the number of candidates appearing on the general election ballot. Contrary to this Court's sound ballot access guidance, I-872 invites ballot crowding and voter confusion at the primary election[93] and

88. U.S. Const. Art. I, § 4, cl. 1.

89. *Storer*, 415 U.S. at 739.

90. *Jones*, 530 S. Ct. at 573 (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), and *La Follette*, *supra*, (footnote omitted)).

91. *White*, 415 U.S. at 781 (U.S. 1974 (citing to *Storer*, 415 U.S. at 733-736 (1974)).

92. *Storer*, 415 U.S. at 739, and *see Lubin v. Panish*, 415 U.S. 709 (1974)(state may not require filing fees to discourage frivolous candidates).

93. *See* Initiative-872 § 9(3) (authorizing any person to become a candidate upon filing a declaration of candidacy), JA-415; and *see* "I-872 Deprives Voters Of The Right To Cast Their Votes Effectively," *infra*.

abandons the "modicum of support" test for access to the general election ballot.

> "It cannot be doubted that these comprehensive words ["time, place and manner"] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[94]

However "broad" the Election Clause powers may be, no other provision in the U.S. Constitution gives states *any* regulatory authority over congressional elections.[95] Specifically, states do not have independent power to adopt their own qualifications for congressional service, and the power to add qualifications for the offices of congressman and senator is not part of the original powers of sovereignty that the Tenth Amendment reserved to the states.[96]

In fact, the purpose of the Elections Clause is "ensuring that elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic

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94. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

95. *Gralike*, 531 U.S. at 522-523.

96. *Thornton, supra.*

process.'"[97] "[T]he Framers understood the Elections Clause as a *grant of authority to issue procedural regulations*, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[98] (emphasis added)

But there is no evidence here or anywhere else to suggest that Washington's "top two" primary scheme ensures the integrity or orderliness of the election process any more than the system it replaced,[99] or that those interests informed its creation. Rather, I-872 abuses the regulatory power delegated by the Elections Clause in each of the three of the ways listed in *Thornton*.

First, the acknowledged objective of I-872—to "winnow" the number of candidates qualified for the general election to a specified number[100]—is plainly "outcome" directed. It ensures that two, and only two, "popular"[101] candidates appear on the general election ballot. "Unpopular" independent or third party candidates need not apply, even

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97. *Gralike*, 531 U.S. at 524, (citing to *Storer*, 415 U.S. at 730).

98. *Thornton*, 514 U.S. at 833-834.

99. When the blanket primary was invalidated the Washington legislature adopted and the governor partially vetoed a bill that resulted in an open primary private choice system similar to one used in Montana. JA - 425-579.

100. "Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to *winnow* the number of candidates to a final list of two for the general election." Wash. Admin. Code 434-262-012. *See also* Wash. Br. – 19, 20.

101. Grange Br. – 9, 15, 33.

though the general rule of speaker's autonomy forbids requiring candidates or political parties to appeal to a larger segment of the electorate.[102]

> History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[103]

Second, I-872 favors candidates expressing a "preference" for political parties then in favor with the public—which everyone knows will be the Democratic Party and/or Republican Party, except perhaps in districts where one party is dominant[104]—and disfavoring candidates who "prefer" political parties out of favor with the public; all regardless whether the candidate has the support of the "preferred" party. Further, there is nothing in I-872 or the balance of Washington election law to prevent a candidate who has been *nominated* by the Libertarian Party from expressing a "party preference" for the Democratic Party or the Republican Party on the ballot. In short, I-872 damages the integrity of the election process by favoring glib, well-financed and telegenic candidates with a Machiavellian streak.

"The fundamental objectives of the freedoms of speech, press, petition, assembly and association were to assist the

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102. *Jones*, 530 U.S. at 583-584.

103. *Sweezy*, 354 U.S. at 251.

104. *See* note 19, *supra*, and accompanying text.

people in self government and to permit the people to thwart the abuse of power by their elected and appointed leaders."[105] But under I-872 rich and varied normative political discourse, including the voices of the poor, rejected and marginalized, which voices the First Amendment was created to protect, will rarely if ever make it to the general election.

Finally, and most alarming, the history of I-872 clearly demonstrates it was designed to evade constitutional restraints on blanket primary systems. Petitioners readily admit I-872 was created in contemplation of the *Jones* decision.[106] However, according to statements made by the Grange itself, I-872 was expressly intended (1) to become effective only if the court decision invalidating the traditional blanket primary[107] becomes final,[108] (2) to "restore the kind of choice that the voters enjoyed for seventy years with the blanket primary"[109] and (3) to "look nearly identical to the blanket primary system"[110] that had just been invalidated.

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105. *Brief of Amici Curiae Seeking Affirmance*, James MacGregor Burns, Barbara Burrell, William Crotty, James S. Fay, Roman B. Hedges, John S. Jackson, III, Everett C. Ladd, Kay Lawson, Gerald Pomper, political scientists, p. 7., *Tashjian v. Republican Party Of Connecticut*, 479 U.S. 208 (1986) (Docket # 85-766).

106. JA 173-174.

107. *Reed, supra.*

108. Initiative 872 § 18, JA - 420.

109. Voter's Pamphlet Statement For Initiative 872, JA – 407, and, *compare*, Initiative 872, § 3, JA - 411, with Wash. Rev. Code § 29.18.200 (2003).

110. "Yes On 872" website home page. *See* http://www.blanketprimary.org/ (Last visited 7/30/07).

A cursory reading of I-872 and its supporting literature reveals the obvious, if not explicitly stated, objective of I-872 was to severely weaken if not destroy all political parties in Washington. All of the Grange's campaign literature for I-872 reflects this anti-party bias. Washington implicitly recognizes this fact, by representing I-872 euphemistically to this court as "a major paradigm shift."[111]

Throughout more than two years of litigation in this case neither Washington nor the Grange has ever suggested that the integrity or orderliness of elections had any role whatsoever in the adoption of the "top two" scheme. In fact, the evidence demonstrates both legitimate state interests were, at best, forgotten or ignored.[112] I-872 is not a valid exercise of Washington's delegated power to regulate the "time, place and manner" of congressional elections.

I-872 DEPRIVES VOTERS OF THE RIGHT TO CAST THEIR VOTES EFFECTIVELY

Washington erroneously argues: "Initiative 872 provides easy access to the ballot, and facilitates the right of qualified voters to cast their votes effectively by allowing all qualified voters to participate in the primary election, without regard to political persuasion."[113] First, this Court has clearly stated easy access to the primary ballot discourages, confuses and frustrates voters.

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111. Wash. Br. – 19, 37.

112. Had either integrity or orderliness of elections been a factor at the drafting stage, I-872 would have explicitly addressed the minor party nominating statutes, which the district court wound up ruling had been "impliedly repealed," Wash. App. 81a-83a, as well as the statutes relating to campaign financing by minor political parties.

113. Wash. Br. – 30.

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.[114]

Second, I-872 limits voter choice in the general election to two candidates only. The "top two" scheme prevents candidates who did not win or place in the primary but who may have shown at a close third from ever being on the general election ballot, despite the intervention of time and possibly crucial events.[115] This Court has already said that the right to vote is an equal protection right, and "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[116]

"[A]bsent recourse to referendums, 'voters can assert their preferences only through candidates *or parties or both*.' By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences."[117]

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114. *Panish*, 415 U.S. at 715

115. For example, one or both of the prevailing candidates could die or be criminally indicted between the primary and general election.

116. *Rhodes*, 393 U.S. at 29, 31.

117. *Illinois Elections Bd.*, 440 U.S. at 184 (1979)(citing to *Panish*, 415 U.S. at 716).

(emphasis added) Here, voters in the general election are not only limited to the number of candidates from which to choose, they are now prevented from voting for any political party. The most they can do instead is to support someone else's stated "preference."

"Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent."[118] I-872 exacerbates this phenomenon by destroying the ability of political parties to protect their identity. Any candidate can claim a "preference" for any political party, regardless of the political views of the candidate or the party. Voter confusion is the necessary result.

I-872 LIMITS INDIVIDUAL RIGHTS OF POLITICAL ASSOCIATION

The central thrust of both petitioner's arguments to this Court is that because "primary voters are not choosing a party's nominee,"[119] the associational rights of individual candidates and voters are enhanced. This argument defies logic.

Even if the State and Grange were correct in asserting that I-872 does not nominate party candidates, I-872 would thereby deprive candidates of their rights of association by

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118. Andrew C. McLaughlin, *Political Parties and Popular Government*, in The Courts, the Constitution and Parties, 151 (1912). And, compare, "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the Manchester Advertiser, Mar. 3, 1911.

119. *Jones*, 530 U.S. at 585, and *see* Wash. Admin. Code 434-262-012.

forcing them to run as "independent" candidates who can express merely a "party preference." That is, I-872 allows candidates to speak *about* a political party on the ballot but deprives them of the right to speak *for* a political party on the ballot. At most, candidates can claim a mere "endorsement" and not a "nomination" by a political party. This court has already held that endorsements are "no substitute" for nominations.[120]

I-872 also deprives voters of the right to vote for a political party nominee, forcing them instead to vote for candidates only.[121] Both the Sixth and Ninth Circuits have recognized that "party identification is the single most important influence on political opinions and voting. . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level."[122] By separating the candidate-party association process from the party candidate selection process, I-872 deceives voters who want to vote for party nominated candidates.

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120. *Jones*, 530 U.S. at 580.

121. *See, e.g., Panish*, 415 U.S. at 716.

122. *Washington State Republican Party v Washington*, 460 F.3d 1108 (2006), (*quoting Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992)). *See* Wash. App. at 21a-22a.

CONCLUSION

In many respects this case is very similar to *Cook v. Gralike*.[123] The sponsors of I-872 were determined to recover the blanket primary regardless of the consequences. They created a system that is unconstitutional on several levels. This court should not only affirm the Ninth Circuit decision, but it should declare emphatically that "top two" primaries deprive third party and independent candidates of their fundamental ballot access rights.

Respectfully submitted,

RICHARD SHEPARD
SHEPARD LAW OFFICE, P.L.L.C.
Attorneys for Respondent
Libertarian Party of Washington
818 South Yakima Avenue
Suite 200
Tacoma, Washington 98405
(253) 383-2235

123. 531 U.S. 510 (2001).